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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D. C. 20554

In the Matter of ) CC Docket No. 98-67  
)  
TELECOMMUNICATIONS RELAY SERVICES AND )  
SPEECH-TO SPEECH SERVICES FOR INDIVIDUALS )  
WITH HEARING AND SPEECH DISABILITIES )  
)

To: Chief, Consumer & Governmental Affairs Bureau

**PETITION FOR RECONSIDERATION**

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July 30, 2003

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### *Summary*

Hands On Video Relay Service, Inc. (“HOVRS”) petitions for reconsideration of the Bureau’s June 30, 2003 *Order*, DA 03-211, which set an interim compensation rate for Video Relay Service (“VRS”) of \$7.751. Reconsideration is necessary because the interim VRS rate is not compensatory. The *Order* therefore risks the degradation or elimination of VRS, an essential service for achieving Section 225's mandate for functionally equivalent telecommunications service for the deaf and hard of hearing community.

The factual premises behind the Bureau’s rejection of the NECA recommended rate, that the rate had increased almost \$12 a minute in two years and was several times higher than Video Remote Interpreting (“VRI”) rates are fallacious. No VRS was provided prior to the rate being set at some \$9.614 a minute, and the rate NECA proposed was a reduction of the rate to \$14.023 a minute from the previously authorized rate of \$17.04 cents per minute. Moreover, VRS costs several times more than VRI because of a variety of factors, including the Commission’s extensive regulation thereof.

The *Order* also must be reconsidered because the VRS interim rate was arbitrarily set. This is because the Bureau admits it lacked sufficient data to set the proper rate. Accordingly, the Bureau’s approach should be to reinstate NECA’s proposed \$14.023 rate pending completion of its review. The *Order* also suffers from the infirmity that the Bureau has no delegated authority to issue “interim rates,” nor any apparent rate-making authority at all.

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The Bureau's application of an 11.25 percent rate of return on investment only to HOVRS and similarly situated providers was inappropriate because HOVRS does not draw from the NECA fund, because HOVRS is a labor intensive rather than a capital intensive enterprise, because the figure was designed for the established RBOCs rather than startup companies like HOVRS, and because the figure simply does not address HOVRS's actual cost of capital.

The Bureau's adjustment of HOVRS's video interpreter ("VI") expenses also must be reconsidered. As will be shown by a detailed traffic study to be submitted with a request for confidential treatment, HOVRS's VI costs were understated not overstated. Thus adjustment in the opposite direction is required.

Finally, no adjustment was appropriate for HOVRS's engineering expenses for reasons which will be shown in the confidential supplement.

For all of these reasons the Bureau should reconsider the interim VRS rate and reinstate the NECA recommended rate of \$14.023 per minute.

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, DC 20554

In the matter of

Telecommunications Relay Services and     )  
Speech-to-Speech Services for Individuals     )     CC Docket 98-67  
with Hearing and Speech Disabilities     )

To: Chief, Consumer & Governmental Affairs Bureau

***PETITION FOR RECONSIDERATION***

Hands On Video Relay Service, Inc. (“HOVRS”), by its counsel and pursuant to FCC Rule §1.106, petitions for reconsideration of the Bureau’s *Order*, DA 03-2111 (June 30, 2003) setting an interim reimbursement rate for Video Relay Service (“VRS”) at \$7.751 (“*Order*”). In support, the following is shown.

***I. HOVRS has standing to petition for reconsideration.***

HOVRS has standing to bring this petition. The essential requisites of standing is that a party suffer a palpable injury, and that injury must be redressable by the action the party seeks.<sup>1</sup>

On that basis, HOVRS plainly has standing to petition for reconsideration of the *Order*.

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<sup>1</sup> *Lujan v. Defenders of Wildlife*, 504 US 555, 560–61 (1992) (The “irreducible constitutional minimum of standing contains three elements”: (1) injury-in-fact, (2) causation, and (3) redressability).

HOVRS is the contract provider of VRS for AT&T and MCI. It commenced provision of VRS under contract with AT&T in December of 2002, and with MCI in April of 2003. Prior to that time, it invested more than two years of effort establishing its VRS operation. HOVRS is aggrieved by the Bureau's *Order* because the interim rate the Commission set is unremunerative. If not reconsidered and increased, it will result in severe degradation of VRS service, a cessation of efforts to improve the service and potentially the loss of all VRS service. Because HOVRS's cost of providing the service is more than the interim VRS rate the Bureau set, there is no amount HOVRS's contracting partners can pay which would compensate it for providing the service in a quality manner without they themselves losing money on the service. Under those circumstances, either HOVRS's contracting partners will cease providing VRS and terminate their contracts with HOVRS, or HOVRS will operate at a loss or degrade service in violation of its assurance of quality to its contracting partners.<sup>2</sup> Therefore, HOVRS is injured by the VRS rate the Bureau set. Reconsideration of the VRS rate will redress HOVRS's injury by allowing it to be paid a compensatory rate for providing VRS. Hence, HOVRS has standing to file this petition.

## ***II. Introduction.***

All TRS rates are set by the Commission based on a formula developed by the National Exchange Carrier Association ("NECA"). NECA develops the reimbursement formula based on demand and cost estimates supplied by providing carriers. For the 2003-04 rate, NECA, apparently

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<sup>2</sup> Docket 98-67 is already showing VRS consumer complaints of long wait times and decreased VRS operating hours.

at the direction of the FCC, also sought demand and cost data from those vendors such as HOVRS, who supply VRS under contract to carriers.<sup>3</sup>

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<sup>3</sup> NECA originally advised HOVRS's counsel that data would not be needed from HOVRS. HOVRS, therefore, had no reason to believe it would be required to compile an estimate of 2003 and 2004 costs and demand. Subsequently, HOVRS was advised in late January that the Bureau wanted such information to be provided. Despite that no rule or regulation of the Commission authorizes the collection of that information from vendors such as HOVRS, and no OMB control number exists authorizing the collection of that information from HOVRS, *see Paperwork Reduction Act of 1995*, 44 U.S.C. §3501, HOVRS in good faith undertook to provide the requested information, diverting efforts needed to ramp up its service for AT&T and MCI. HOVRS stresses, however, that its reporting and management systems were not set up to generate the data the Bureau requested. Subsequently, HOVRS was advised that the Bureau was seeking very detailed data concerning its cost projections. Again, valuable staff and management time was devoted to compiling that data hurriedly, which HOVRS had not previously had a reason to compile.

On May 1, 2003, NECA submitted its proposed TRS fund contribution and reimbursement rates for all TRS services. For VRS, the proposed reimbursement rate was \$14.023 and the recommended funding level was \$34,052,724.

In the *Order*, the Commission stated it decided to conduct a full review of VRS costing data based on two factors. First, that the NECA recommended VRS rate was four to five times higher than anecdotal evidence that the Bureau had for the rates for Video Remote Interpreting (“VRI”).<sup>4</sup> The Bureau acknowledged that VRS costs might be higher than VRI costs, but nevertheless questioned the degree to which that may be true, especially in light of waivers granted VRS from certain TRS requirements. *Order*, at paras. 31-32 & n.86. Second, the Bureau expressed concern that the rate for VRS had increased from approximately \$5 a minute to more than \$17 a minute in two years. *Order*, at para. 29. In actuality, however, NECA was proposing a decrease of some \$3 a minute to \$14.023 for 2003-04. Thus, the actual VRS rate would have decreased, not increased, had the FCC adopted the NECA recommendations.

After reviewing detailed cost data, the Bureau stated that the data supplied did not support the \$14.023 rate NECA recommended, and that areas it had identified raised complex issues

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<sup>4</sup> VRI is a service which allows consumers to schedule interpreters via a point to point video-conference (generally a minimum time period) instead of having a live, on-site interpreter. The *Order* suggests that VRI rates range from \$2.50 to \$3.25 per minute.



requiring more time than available to research fully. The Bureau did not in the *Order* identify specific problems with each provider's data. This was because various providers had requested confidential treatment of their data. The Bureau did say that data submitted by three providers either contained various errors or was predicated on incorrect assumptions, and was therefore not reliable. The data for these providers were not considered the Bureau stated. *Order* at para. 36.

The Bureau further stated that it modified the VRS rate by limiting profit to VRS providers to 11.25 percent of return on investment only, plus applicable tax allowances (which were not specified). It, therefore, refused to allow a profit margin on non-capitalized costs. In addition, the Bureau indicated it disallowed certain interpreter salary costs due to estimates that "incorporate labor inefficiencies and excess capacity or that are based on inconsistent reimbursable minutes and labor behavior." *Order*, at para. 36.<sup>5</sup>

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<sup>5</sup> It is unclear exactly from that statement what the Bureau did with labor costs; however, Bureau representatives met with HOVRS and explained the adjustments made to its costs. HOVRS will address those specific adjustments in detail in a supplement which will be filed to this petition and for which confidential treatment will be requested. The staff has indicated informally that such a supplement will be considered.

Following its review, the Bureau in the *Order* set an “interim” rate for VRS of \$7.751 and indicated that this rate would be subject to adjustment following further study. Other TRS rates approved in the *Order* were also indicated to be “interim rates.”

As we show herein, adjustment of the NECA recommended rate from \$14.023 to \$7.751 threatens the viability of VRS. While FCC review of the VRS rate is appropriate to ensure the integrity of the TRS fund, slashing the NECA recommended rate by more than 40 percent when the Bureau admits it lacked sufficient data to determine the appropriate rate, risks severely degrading VRS service provided the deaf and hard of hearing community, unfairly penalizes startup enterprises such as HOVRS, and fails to meet the policy goals of Section 225 to provide deaf and hard of hearing callers service comparable to that provided by the public switched telephone network. Moreover, the method by which the Bureau has proceeded -- setting a rate without adequate data -- appears both to exceed its authority and has resulted in an arbitrary and unsupportable decision.

In addition, we will show that a profit determination based on a rate of return of 11.25 percent of investment only is an inappropriate margin for a labor intensive enterprise which differs substantially from the established, capital intensive, landline telephone networks for which the 11.25 percent rate of return figure was prescribed.

Furthermore, at least in HOVRS’s case, we will show there are no substantial labor inefficiencies meriting rejection or reduction of its proposed interpreter salary costs. In fact, as the confidential supplement will show, due in part to the time pressure HOVRS was under when it prepared its cost estimates, it underestimated the costs necessary to provide VRS in both 2003 and 2004.

Reconsideration is therefore necessary to remedy these various defects in the *Order*. On reconsideration, the Bureau should adopt the NECA recommended rate of \$14.023 pending its full review and resolution of the complex issues raised concerning the VRS rate.

### ***III. Discussion.***

#### **A. The premises behind the examination of the VRS rate are invalid.**

The Bureau states its evaluation of VRS data was premised on two factors: first that the VRS rate had increased from about \$5 to \$17 in two years; and second, that VRS projected costs were several times prevailing costs for VRI. Both of these factual predicates for reducing the VRS recommended rate from \$14.023 to \$7.751 are faulty.

NECA has confirmed for HOVRS that no VRS minutes were ever submitted when the rate for service was \$5.143, from July 2000 through September 2000. No VRS minutes were ever submitted when the VRS rate was \$5.539, from October 2000 through June of 2001. And no VRS minutes were ever submitted when the VRS rate was \$7.449 in July of 2001. Only after the rate had increased to \$9.614 in August 2001 to June 2002 was any VRS service provided, and the actual number of minutes at that rate was relatively limited.<sup>6</sup>

In fact then, the only real VRS rate increase was from \$9.614 to \$17.044. That higher rate NECA proposed to decrease by approximately \$3 a minute for 2003-04. The \$14.023 rate NECA proposed represented a reasonable ratcheting down of the admittedly high \$17.044 rate resulting from the achievement of economies of scale of an industry which is barely out of its infancy. The

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<sup>6</sup> NECA advised that the first legitimate minutes submitted for VRS was in March of 2002 for January 2002 minutes. The rate covering that period was \$9.614 per minute. *See Order at n.52.*

Bureau must recall that until December of 2002, there were only two VRS providers, only one of whom was offering IP based VRS. Even today, there are only four separate providers of VRS, and all but one of them can justly be classified as a startup entity. Given that the price of VRS was proposed to be decreased, not increased, it was inappropriate for the Bureau to subject VRS providers to exacting scrutiny, especially given the short time frames allowed for compilation of the data requested.

Likewise, the comparison of VRS with VRI is unavailing for a variety of reasons. VRI can be provided over T-1 or ISDN lines, VRS providers serving any appreciable level of traffic must be equipped with one or more DS-3 Internet connections. VRS requires complicated local area networks with the ability to switch calls among video interpreting stations; VRI does not. VRI is a point to point service; VRS is a telecommunications service connecting deaf and hard of hearing with hearing individuals. VRS must deal with firewall issues on the customer side and must nevertheless have in place adequate protection to guarantee the privacy of VRS calls; VRI has fewer of such security issues. VRS requires extensive hardware investment which must be sized to accommodate peak call volume and VRS providers have a common carrier duty to provide service; VRI is a scheduled service and its providers can simply turn customers away if their capacity is exceeded. VRS requires customized software to meet FCC periodic reporting requirements; VRI is under no such obligation. VRS must maintain records of customer complaints, report on the resolution thereof and satisfy regulatory followup requests; VRI has no such obligations. VRS must ultimately meet the exacting TRS rules which are currently waived, and is expected to expend

considerable yearly research and development efforts toward meeting those requirements; VRI has no such obligation. VRS has considerable legal costs due to its regulated status; VRI providers do not have such costs. VRS providers must staff for peak call volume, which varies from day to day, and hour to hour resulting in low utilization rates for interpreters; VRI is a scheduled service which need not pay interpreters merely to be prepared to take an assignment. (A more exhaustive comparison of the two services is attached as Exhibit 1.) Suffice it to say that while VRS and VRI may appear similar on the surface, when the two services are compared up close, it is understandable why VRS costs are several times the cost of VRI. Thus VRI costs are no basis to question VRS costs.

2. The Bureau's prescription of an "interim rate" is arbitrary and without delegated authority.

The Bureau's prescription of an "interim" VRS rate is procedurally deficient for two reasons. First, it is arbitrary. Second, it is made in the absence of any delegated authority.

The Bureau's prescription is arbitrary because it was made admittedly without sufficient data. The Bureau admits that complex issues are raised which require further research and study. Apparently, then without making a determination that inappropriate cost estimates have been made, the Bureau has excluded these costs. This "when in doubt throw 'em out" approach is the height of arbitrariness. Expenses for which the Bureau has further questions should be counted until the Bureau is convinced they are unacceptable. Otherwise, the Bureau risks proscribing a rate which is not compensable and which would degrade or destroy VRS service. Again, it is to be emphasized that no VRS was provided at a rate lower than \$9.614. Plainly, submerging the VRS rate below that

\$9.614 figure should have raised a red flag to the Bureau that it risked destruction of the program altogether.

Compounding the arbitrariness of the Bureau's prescription is its lack of delegated authority to proscribe an interim rate. FCC Rule Section 0.141 (Functions of Consumer and Governmental Affairs Bureau) contains no provision relating to the setting of interim rates. Indeed, this section contains no reference to rate making at all, either generally or in connection with the Bureau's functions relating to persons with disabilities. By contrast, the rate making functions of the Wireline Competition Bureau are plainly apparent. Moreover, FCC Rule Section 0.361 denies the Chief of the Government and Consumer Affairs Bureau the authority to decide matters "that present novel questions of law, fact or policy that cannot be resolved under existing precedents and guidelines." It is plainly apparent from the Bureau's statements in the *Order* that novel questions of law fact and policy are presented here. *Order*, at para. 34. The most glaring is that of the denial of profit and the proscription of a 11.25 rate of return on investment only. As the Bureau admits the FCC's rules are silent on these matters. Thus, these matters should not have been decided on delegated authority. Reconsideration is necessary to vacate the "interim rate" prescription and to refer the matter to the full Commission for resolution.

1. The Bureau's application of an 11.25 rate of return on investment to VRS is inappropriate.

The *Order* adjusted the cost filings to prescribe an 11.25 percent rate of return on investment only. *Order*, at para. 35. This figure was derived from the proceeding *Establishing a Rate of Return for Interstate Services for Local Exchange Carriers*, 13 FCC Rcd 20561 (1998). See also *Represcribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers*,

5 FCC Rcd 7507 (1990). Application of the 11.25 percent rate of return figure to HOVRS and other VRS providers is not appropriate for several reasons.

First, HOVRS does not draw from the NECA fund. Hence its costs and capital structure are irrelevant and not within the Commission's jurisdiction. AT&T and MCI, HOVRS's contracting partners, draw from the fund and thus, if anything, the Commission's examination of costs should have been limited to them. HOVRS was selected by AT&T following a competitive RFP process. It likewise engaged with MCI in an arms length contract negotiation. HOVRS's cost control was thus accomplished by market forces. Review of HOVRS's cost and capital structure is no more justified than would be FCC review of HOVRS's individual vendors. Thus, the Bureau must reconsider its application of an 11.25 percent rate of return on investment only to HOVRS, and examine only the costs of entities entitled to draw from the NECA fund.

Second, the rate of return on investment only methodology the Bureau used may be appropriate in the context of a monopoly capital intensive telephone company, but it is hardly appropriate in the context of a predominately labor intensive enterprise such as VRS. Return or profit is designed to compensate a business owner for the risk he must face in the marketplace. A VRS operator faces risk of capital whether he uses it to purchase capital equipment, or he uses it to purchase the labor of a video interpreter. In point of fact he faces less risk with the capital equipment because it has residual value. The VRS operator, however, has little residual value in the labor of his employees unless that labor is put to immediate productive use. Hence a VRS operator should be allowed a reasonable profit not only on capital expenditures, but on his other costs as well.

In this connection the suggestion that allowing profit on top of expenses encourages overspending is overstated for at least two reasons. First the Commission, to the extent it has the authority to review vendor costs, can examine the reasonableness of those costs, and in fact that appears the intent of the exercise in question here. Second, the rate of return on investment methodology itself suffers from the tendency of encouraging regulatees to overinvest to increase profits, the gold plating problem.

Government contracts present at least a somewhat analogous situation. There a reasonable profit is an expected component of a contract price. *See generally* Federal Acquisition Regulations, Part 16. Guidelines for profit allowances on Federal contracts do not appear readily accessible. Instructive, however, is the Profit and Fee Guidelines for the Sandia National Laboratories (“SNL”), attached as Exhibit 2, hereto. That document suggests a profit margin upwards of 10-15 percent of the contract cost for cost plus fixed fee contracts as well as 10-15 percent of the hourly labor rate for time and materials contracts, depending in each instance on whether the contract is for experimental, developmental or research services or a less risky service. Thus, a reasonable profit on expenses is a more apt return model for labor intensive services such as VRS.

Third, even if a rate of return methodology were appropriately employed here, the 11.25 percent figure the Bureau adopted is vastly inadequate. The 11.25 percent rate of return adopted in 1990 was adopted after an exhaustive review of the capital structures, including their cost of capital and debt, of the seven regional bell operating companies (“RBOCs”), some of the larger corporations in the United States. That figure has no relationship to the cost of capital of HOVRS, a small start up company, or any of the other actual providers of VRS service. Unlike the RBOCs,



HOVRS cannot tap the equity or debt markets. HOVRS's cost of capital is substantially higher than these entities.<sup>7</sup> Applying a rate of return to it and similarly situated entities fashioned for the RBOCs is nonsensical.

Fourth, it is not apparent from the data the staff has provided HOVRS that all amounts actually invested in the entity were considered when the Bureau applied the 11.25 percent figure. This also will be addressed more fully in HOVRS's forthcoming confidential supplement.

In sum, the Bureau application of an 11.25 percent rate of return on investment to HOVRS was inappropriate because HOVRS does not draw from the NECA fund, because HOVRS is a labor intensive rather than a capital intensive enterprise, because the figure was designed for the established RBOCs rather than startup companies like HOVRS, and because the figure simply does not address HOVRS's actual cost of capital. For all of these reasons the Bureau should reconsider the application of that 11.25 percent figure and adopt a return/profit figure premised on the actual cost of providing VRS.

**D. No downward adjustment in HOVRS's video interpreting costs was appropriate.**

Upon being requested to provide detailed cost estimates, HOVRS revised its initial demand estimates for 2003 downward to reflect actual operating trends reflective of a slower ramping up process than it and its vendor partners had initially projected. The Bureau adjusted proportionately

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<sup>7</sup> This will be explained in detail in HOVRS's forthcoming confidential supplement.

HOVRS's video interpreting and related costs downward based on HOVRS's adjustment downward of 2003 VRS demand from its initial projection. Although the Bureau's adjustment was seemingly logical, in actuality HOVRS's VI costs were understated rather than overstated. The understatement occurred because of flaws in its traffic analysis due in part to the lack of actual operating data and partly due to the novelty of the information the Bureau requested. HOVRS will submit in its confidential supplement a traffic analysis study based on actual operational data, including daily and hourly call distribution over the course of a two week study period and call duration data compiled for the first six months of 2003. That information will show that HOVRS underestimated its video interpreting related costs for 2003 and 2004, and will present revised costs for these items and for other related affected items. Because of the confidential nature of this data, further discussion in this document is inappropriate.

**E. No adjustment in HOVRS's engineering expenses is justified.**

The Bureau rejected certain of HOVRS's engineering and software related expenses because it was substantially in excess of other provider's expenses and because the Bureau apparently believed some of those expenses should more appropriately be capitalized. Because of the nature of these expenses, HOVRS will address the Bureau's treatment of them in its confidential supplement and show that the Bureau's treatment of them was erroneous.

***IV. Conclusion.***

There can be no question of the utility of VRS, allowing deaf and hard of hearing persons to communicate in their primary visual language to achieve the functional equivalency of a hearing person's dial tone, and without the need of a key board. Indeed, VRS opens telecommunications to new groups using this service that were previously omitted from access to relay services in the United States. These are the many deaf and hard of hearing community members that cannot or are not comfortable using text based English as a way to communicate. Previously they had to go to deaf community service centers who employ sign language interpreters on staff and use them to make their phone calls. Children under ten years old that do not have the text English skills to communicate effectively using TTY and IP relay can now communicate with VRS. Foreign born deaf and hard of hearing persons who are United States residents and who are fluent in ASL but not text English now have a way to use telecommunications. Deaf and hard of hearing community members that have dexterity disabilities that impair their ability to perform fine motor skilled functions typing text based English on a TTY and or for IP relay also now have telecommunications capability. Although VRS may be an optional service for relay providers, it is an essential service

Respectfully submitted,

By /s/  
George L. Lyon, Jr.  
Its Counsel

July 30, 2003

*Certificate of Service*

I, Jennifer C. Colman, do hereby certify that copies of the foregoing Petition for Reconsideration were sent on this 30th day of July, 2003, via first-class mail, except where noted, postage pre-paid, to the following:

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